

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR KENT COUNTY

BAYHEALTH MEDICAL CENTER, :  
 : C.A. No. 08A-08-003WLW  
Employer/Appellant, :  
 :  
v. :  
 :  
WALTER COVERDALE, :  
 :  
Employee/Appellee, :  
 :  
v. :  
 :  
MODERN MATURITY CENTER, :  
 :  
Employer/Appellee. :

Submitted: February 18, 2009

Decided: April 20, 2009

**ORDER**

Upon Employer's Appeal of a Decision of the  
Industrial Accident Board and Employee's  
Cross-Appeal. *Reversed.*

Timothy A. Casey, Esquire and Keri L. Morris, Esquire of Marshall Dennehey  
Warner Coleman & Goggin, Wilmington, Delaware; attorneys for  
Employer/Appellant.

Walt F. Schmittinger, Esquire and Kristi N. Vitola, Esquire of Schmittinger and  
Rodriguez, P.A., Dover, Delaware; attorneys for Employee/Appellee.

Robert H. Richter, Esquire of Elzufon Austin Reardon Tarlov & Mondell,  
Wilmington, Delaware; attorneys for Employer/Appellee.

WITHAM, R.J.

## FACTS

Walter Coverdale, Employee-below (“Claimant”) sustained an acknowledged and compensable injury to his low back on November 9, 2000, while lifting boxes in the course and scope of his employment for Employer-below/Appellant Bayhealth Medical Center (“Bayhealth”) (“the November 2000 injury”). On July 28, 2005, Claimant sustained a second injury to his low back, this time while employed by Employer-below/Appellee Modern Maturity Center (“the July 2005 injury”).

After the November 2000 injury, Claimant’s treatment included epidural injections, physical therapy and medication. Claimant’s treating physician, Dr. Ganesh Balu (“Dr. Balu”) referred Claimant to Dr. Ali Kalamachi (“Dr. Kalamachi”), who discussed with Claimant the option of having surgery, which at the time had a fifty percent chance of success. Claimant, however, was not interested in having the surgery. Claimant testified before the Industrial Accident Board (“IAB” or “Board”) that by July 2005, his chronic back pain had been slowly worsening, and that he was starting to consider having the surgery.

On July 28, 2005, Claimant slipped on a wet floor while working for Modern Maturity Center, and his back “popped.” Claimant testified that while the pain remains in the same location, it is more severe, and the pain running down his leg is more frequent. After this second injury, Claimant’s treating physician referred him to Dr. Richard DuShuttle (“Dr. DuShuttle”), who discussed the same surgery with Claimant, but explained that now there would be a seventy percent chance of success. Claimant testified that due to his increased pain and the increased odds of the

surgery's success, he now wants the surgery.

Dr. DuShuttle opined that Claimant's first injury is predominately responsible for Claimant's current condition, adding that the second injury exacerbated the first injury. He explained that although Claimant's condition worsened since the second injury, Claimant's current condition remains relatively the same as it was since the first injury.

Dr. Jerry Case ("Dr. Case") testified on behalf of Modern Maturity Center. After examining Claimant and reviewing his medical records, Dr. Case opined that Claimant's current condition is related to the November 2000 injury, and that there is no evidence that Claimant's condition worsened as a result of the July 2005 injury.

Dr. Donald Saltzman ("Dr. Saltzman") testified on behalf of Bayhealth. Dr. Saltzman opined that Claimant's current condition is causally related to the second injury and not to the first injury. He testified that a medical note categorized the second injury as an exacerbation of the first injury, and noted that Claimant's treatment was increased after the second injury. Furthermore, Dr. Saltzman examined Claimant before and after the July 2005 injury, and noticed worsening symptoms and reduced range of motion.

On December 21, 2007, the Board held a hearing on Claimant's petition for additional compensation, to include payment for the back surgery, and issued its decision on June 11, 2008. The Board found that Claimant's current condition is a recurrence of the November 2000 injury, and not an aggravation of that injury resulting from the July 2005 slip and fall. Bayhealth filed its opening brief in

opposition of the Board's decision on October 30, 2008. Claimant filed an answering brief and cross-appeal on December 1, 2008. Modern Maturity Center filed its answering brief in support of the Board's decision on December 22, 2008.

### **STANDARD OF REVIEW**

The review of an Industrial Accident Board's decision is limited to an examination of the record for errors of law and a determination of whether substantial evidence exists to support the Board's finding of fact and conclusions of law.<sup>1</sup> Substantial evidence equates to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."<sup>2</sup> This Court will not weigh the evidence, determine questions of credibility, or make its own factual findings.<sup>3</sup> Errors of law are reviewed *de novo*. Absent error of law, the standard of review for a Board's decision is abuse of discretion.<sup>4</sup> The Board has abused its discretion only when its decision has "exceeded the bounds of reason in view of the circumstances."<sup>5</sup>

### **DISCUSSION**

The issues before the Board were whether Claimant's present back condition

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<sup>1</sup> *Histed v. E.I. Dupont de Nemours & Co.*, 621 A.2d 340, 342 (Del. 1993).

<sup>2</sup> *Olney v. Cooch*, 425 A.2d 610, 614 (Del. 1981) (quoting *Consolo v. Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966)).

<sup>3</sup> *Collins v. Giant Food, Inc.*, 1999 WL 1442024, at \*3 (Del. Super. 1999) (quoting *Johnson v. Chrysler Corp.*, 213 A.2d 64, 66-67 (Del. 1965)).

<sup>4</sup> *Digiacommo v. Bd. of Pub. Educ.*, 507 A.2d 542, 546 (Del. 1986).

<sup>5</sup> *Willis v. Plastic Materials*, 2003 WL 164292, at \*3 (Del. Super. 2003).

results from a recurrence of the November 2000 injury, or an aggravation of the injury caused by an untoward event which occurred on July 28, 2005, and whether the contemplated surgery is reasonable, necessary, and causally related to either work injury. In order to answer the first question, the Board relied on *Standard Distributing Co. v. Nally*,<sup>6</sup> and found that the second injury to Claimant's back was a recurrence, and not an aggravation, of the first injury.<sup>7</sup>

When the Board is faced with a recurrence/aggravation dispute where the parties have conceded that one of them is liable for the claimant's injuries, the Board must make two determinations before shifting liability to the new employer: (1) whether there was an intervening or untoward event giving rise to the claim; and (2) if there was an untoward event, whether it caused an aggravation of the claimant's physical condition.<sup>8</sup>

The standard for determining whether a second injury is an "aggravation," for which the second employer pays, or a "recurrence," for which the original employer remains liable, is set out by the Delaware Supreme Court in *Standard Distrib. Co. v. Nally*. The Supreme Court held that the question turns on a question of fact, whether there has been a new injury or worsening of a previous injury attributable to an untoward event. As a matter of law, an untoward event is a genuine intervening event which brings out a new injury. Shifting responsibility from one employer to another requires a second

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<sup>6</sup> 630 A.2d 640 (Del. 1993).

<sup>7</sup> The Court will not address the Board's finding that the contemplated surgery is reasonable and necessary.

<sup>8</sup> *Mountaire Farms, Inc. v. Pitts*, 2000 WL 710094, at \*5 (Del. Super. May 1, 2000).

accident or event, beyond the normal duties of employment.<sup>9</sup>

The Board's inquiry must focus on the nature of the second event, to determine whether the event went beyond the normal duties of employment<sup>10</sup> and resulted in an aggravation of the claimant's injuries.<sup>11</sup> The focus should not be on symptomatology, but on the causative effect of the second event. "Aggravation" of an injury means that the condition has been "made worse, more serious, or more severe."<sup>12</sup> However, the symptomatic worsening of claimant's physical condition does not automatically equal aggravation; the Board must find that the worsening of the previous injury is attributable to an untoward event.<sup>13</sup>

In the case *sub judice*, the Board erred as a matter of law when it based its decision on symptomatology without properly considering causation. The Board found, as follows:

The Board finds that Claimant's condition is the result of the first injury; the second injury was merely a recurrence of the first injury. . . .

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<sup>9</sup> *Giant Foods v. Fowler*, 2001 WL 1198945, at \*3 (Del. Super. Sep. 28, 2001) (internal citations omitted).

<sup>10</sup> A traumatic accident or event is considered outside the normal duties of employment. *Turulski Custom Woodworking v. Sun Dog Cabinetry*, 2004 WL 1172884, at \*9 (Del. Super. May 11, 2004); *Giant Foods*, 2001 WL 1198945, at \*4; *Mountaire Farms*, 2000 WL 710094, at \*5 (finding that a slip and fall at work is not a normal work duty and is instead an untoward event).

<sup>11</sup> *Nally*, 630 A.2d at 645.

<sup>12</sup> *Mountaire Farms*, 2000 WL 710094, at \*5 (quoting *Webster's Ninth New Collegiate Dictionary*, 64 (1990)).

<sup>13</sup> *Nally*, 630 A.2d at 645.

*Bayhealth v. Coverdale v. Modern Maturity*

C.A. No. 08A-08-003 WLW

April 20, 2009

Although Claimant's symptoms have worsened after the second injury, . . . Claimant's overall condition has remained relatively the same since the first injury. [S]urgery was contemplated prior to the second injury and that is the same surgery being contemplated currently. Therefore, it is not the second injury that caused Claimant's current condition and need for surgery but rather the first injury. The Board finds that the second injury constitutes a recurrence as opposed to an untoward event and therefore, Bayhealth is responsible for Claimant's workers' compensation benefits.<sup>14</sup>

The Board acknowledged that Claimant suffered a worsening of symptoms after the second injury. However, the Board focused on Claimant's prior eligibility for surgery in its determination that the second injury was not an untoward event. The Court finds that this focus on surgical eligibility was legal error. Instead, the Board should have focused on the facts surrounding the second event to determine whether a slip and fall on a wet floor at work is beyond the normal duties of employment. In examining Delaware case law on this subject, the Court finds that a traumatic accident like a slip and fall is, in fact, an untoward event. Therefore, because Claimant experienced a worsening of symptoms after the slip and fall, the Court reverses the decision of the Board. Liability, therefore, shifts to Modern Maturity Center for Claimant's additional compensation, which includes the proposed surgery.

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<sup>14</sup> IAB decision at 8, 9.

*Bayhealth v. Coverdale v. Modern Maturity*

C.A. No. 08A-08-003 WLW

April 20, 2009

## CONCLUSION

For the foregoing reasons, the decision of the Industrial Accident Board is REVERSED. IT IS SO ORDERED.

/s/ William L. Witham, Jr.  
R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution